

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76K 30158059 BY -BRANDON J &amp; JANNA W PAGE</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On August 24, 2022, Brandon and Janna Page (Applicant) submitted Application for Beneficial Water Use Permit No. 76K 30158059 to the Missoula Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 35 gallons per minute (GPM) up to 2.25 acre-feet (AF) for the beneficial use domestic and lawn and garden. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 18, 2023. The Department met with the Applicant for a pre-application meeting August 22, 2022. An Environmental Assessment for this Application was completed on June 16, 2023.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-SW
- Attachments
  - Ecological Resource Consulting Water Quality Evaluations of Lindbergh Lake, 1989-1993, prepared by Ken Knudson
  - Missoula County Septic Permit #SP22-0199
- Maps:
  - 8/6/2022 Aerial photo showing parcel location
  - 8/6/2022 Aerial photo showing parcel outline and point of diversion
  - Site map identifying conveyance facilities
  - Map showing preliminary design plan

### Information within the Department's Possession/Knowledge

- Department of Natural Resource and Conservation's physical availability analysis for Swan River below Cygnet Lake to Condon, MT using United States Geological Survey (USGS) stream flow data from the Swan River Gage (No. 12369200) near Condon, MT and the USGS Streamflow Record Extension Facilitator (SREF) program.
- Legal availability analysis for Swan River below Cygnet Lake to Condon, MT

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

### **PROPOSED APPROPRIATION**

#### FINDINGS OF FACT

1. The applicant proposes to divert water from the Swan River (Lindbergh Lake), hereafter Lindbergh Lake, by means of a 2.0 horsepower (hp) pump from January 1 to December 31, at 35 GPM up to 2.25 acre-feet (AF), from a point in the NENWSE of Section 23, T19N R17W, Missoula County. The proposed use is 1.0 AF for domestic from January 1 through December 31 and 1.25 AF for 0.50 acres of lawn and garden from April 25 through October 5. The place of use is located Diamond L Bar Lakeshore Tract #3, Lot 60A of Certificate of Survey No. 6828; NENWSE Section 23, T19N, R17W, Missoula County.
2. Lindbergh Lake is located 14 miles south of Condon, Montana in the Seeley-Swan Valley. The Swan River flows into and out of Lindbergh Lake, with water leaving Lindbergh Lake flowing immediately into Cygnet Lake. The outlet of Cygnet Lake is the Swan River, which then flows to Flathead Lake, approximately 80 river miles to the north, after flowing over the Bigfork Dam about one mile upstream from the mouth of the river. The proposed appropriation is located within basin 76K Swan River which is open to applications for new surface water appropriations.
3. Domestic use will occur in one residence with a septic system located on a neighboring property east of Lindbergh Lake Road (see Missoula County Septic Permit # SP22-0199 for Recorded Permanent Sewer Easement). Lawn and garden irrigation will occur from April 25 to

October 5 annually. Water will be conveyed from a pump placed in the lake through a 2-inch pipe to an on-site pressure tank and standard domestic plumbing.

4. Consumptive use of the proposed beneficial use is estimated to be 10% of the diverted volume for domestic, 0.10 AF annually ( $1.0 \text{ AF} \times 0.10 = 0.10 \text{ AF}$ ), and 70% of the diverted volume for lawn and garden irrigation, 0.88 AF annually ( $1.25 \text{ AF} \times 0.7 = 0.88 \text{ AF}$ ). Total consumptive use will be 0.98 AF ( $0.10 \text{ AF} + 0.88 \text{ AF} = 0.98 \text{ AF}$ ).



## 76K 30158059 Permit Application Map



0 0.5 1 2 Miles

Map Created: 6/16/2023

1:100,000

Imagery: 2021



## **§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

### **GENERAL CONCLUSIONS OF LAW**

5. The Montana Constitution expressly recognizes in relevant part that:

- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
- (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

6. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

- ... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
- (a) (i) there is water physically available at the proposed point of diversion in the

amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, "the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural



resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

7. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

- (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M* by *Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242* by *Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

8. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Westmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

9. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

10. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **Physical Availability**

### **FINDINGS OF FACT**

11. The proposed source of appropriation is Lindbergh Lake. This lake is a natural water body located near the headwaters of the Swan River in the Mission Mountains. Water flowing out of Lindbergh Lake flows into Cygnet Lake immediately below the Lindbergh Lake outlet. From Cygnet Lake, the Swan River flows north approximately 57 river miles to the Swan Lake inlet



and eventually discharges into Flathead Lake near the town of Big Fork, 15 river miles from the outlet of Swan Lake.

12. The Department calculated physical availability of water for the proposed appropriation using United States Geological Survey (USGS) stream flow data from the Swan River Gage (No. 12369200) near Condon, MT and the USGS Streamflow Record Extension Facilitator (SREF) program. USGS Gage No. 12369200 was located in the NESWNW of Section 8, T19N, R16W, Missoula County, approximately 5.5 river miles downstream of the proposed point of diversion. In the past, the Department has utilized the 20 years of record (1972-1992) for USGS Gage No. 12369200 at Condon when assessing physical and legal availability for water right permits on Lindbergh Lake, Cygnet Lake and the upper Swan River. Due to the 26-year gap in data, from the date that the station was taken out of service (9/30/1992) to present, and the potential for changes in timing of precipitation and runoff events, the Department utilized the Streamflow Record Extension Facilitator to extend the Condon gage record. The Condon gage falls within the USGS's definition of a short-term continuous-record gaging station, which is identified by having 1 to 20 years of continuous, interpreted daily discharge records.

13. The USGS SREF program, in conjunction with data from nearby streamflow gaging stations, was used to extend the record of the Condon gage from its date of removal from the network (9/30/1992) to 10/22/2018. Two gages with long-term records were utilized: Swan River near Bigfork ( No. 12370000) and South Fork Flathead River above Twin Creek near Hungry Horse (No. 12359800). When data from the Swan and the Flathead gages are fitted to a regression line to determine how closely correlated they are to the Condon gage, the R-squared values are 0.967 (96.7%) and 0.973 (97.3%), respectively, indicating a close correlation to the gage with which they are being compared. The statistical program was run using the following parameters:

- Begin Date: 10/01/1972
- End Date: 10/22/2018
- NWIS Web Daily Value RDB selected
- Use MOVE.1 or MOVE.3 with multiple stations selected
- Finalize Multiple Index-Station Selection: 12359800 and 12370000 selected

- Select Regression Model: MOVE.1 selected
- Select Concurrent Values: Use predicted values selected
- Apply BCF: Yes

14. A comparison of physical availability between the 20 years of gaging record at Condon to the extended record, which includes the 20 years of actual data, shows a slight increase in flow rate primarily during the months associated with spring runoff and a decrease in flow rate during summer months, primarily in the month of July. The following table shows the median of the monthly mean (MMM) using the SREF program to extend the data to October of 2018, median of the monthly mean for unaltered Condon gage data, and the difference between the two:

**Table 1.** Comparison of Condon Gage Data (October 1972 – October 1992) with USGS SREF modeled outputs (gage: October 1972 – October 1992, model: November 1992 – October 2018)

Month	MMM SREF (CFS)	Condon Gage (CFS)	Difference (SREF minus Condon) (CFS)
January	44.67	48.25	-3.58
February	43.61	44.75	-1.14
March	75.35	71.05	4.30
April	209.73	199.25	10.48
May	420.61	384.60	36.01
June	492.45	462.60	29.85
July	211.18	318.45	-107.27
August	77.77	99.80	-22.03
September	52.17	67.00	-14.83
October	57.60	55.15	2.45
November	60.95	60.95	0.00
December	47.15	47.15	0.00

15. Physical availability at the proposed point of diversion is calculated by adding existing legal demands between the Condon gage station and the proposed point of diversion to the median of the mean monthly flow. The following table reflects physically available water at the point of diversion based off values from the USGS gaging station and SREF program:

**Table 2.** Median of the mean monthly flows at the requested point of diversion during the requested period of diversion per USGS SREF

Physical Availability at POD using Condon Gage # 12369200 per USGS SREF				
<u>Month</u>	<u>Median of the Mean (CFS)</u>	<u>Existing Legal Demands (CFS)</u>	<u>Physically Available Water (CFS)</u>	<u>Physically Available Water (AF)</u>
January	44.67	3.23	47.90	2745.10
February	43.61	3.23	46.84	2420.50
March	75.35	3.27	78.62	4631.09
April	209.73	3.52	213.25	12469.02
May	420.61	4.04	424.65	25847.89
June	492.45	4.04	496.49	29281.92
July	211.18	4.04	215.22	12967.26
August	77.77	4.04	81.81	4766.15
September	52.17	4.04	56.21	3089.67
October	57.60	4.00	61.60	3530.96
November	60.95	3.74	64.69	3625.02
December	47.15	3.31	50.46	2906.52

16. The Department’s calculation of median of the mean monthly flow and volume at Applicant’s proposed point of diversion demonstrates that the requested 35 GPM up to 2.25 AF is physically available in each month of the proposed appropriation.

### CONCLUSIONS OF LAW

17. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

18. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

19. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF Nos. 11-16)

**Legal Availability:**

**FINDINGS OF FACT**

20. To calculate legal availability, the Department queried its records for all water rights listing Lindbergh Lake, Cygnet Lake and/or Swan River as the source between the proposed point of diversion to the confluence of Glacier Creek and the Swan River. To determine the amount of water legally available, existing water rights within the area of potential impact were subtracted from the amount determined to be physically available at the point of diversion. The Department considers this to be an appropriate reach for calculating legal availability due to the large volume of water in Lindbergh Lake and the amount of water determined to be physically available using the extended data for the USGS gaging station near Condon. The Department did not analyze water rights below the point where Glacier Creek joins the Swan River because the Swan River gains water from numerous tributaries originating from the Swan and Mission mountain ranges, and flow subsequently increases the farther downstream you travel.

21. Within the reach analyzed for legal availability, there are 100 surface water rights. Following are the water rights in the reach of stream analyzed for legal availability, including all water rights with points of diversion in Lindbergh Lake downstream to the confluence of Glacier Creek and the Swan River. No surface water rights listing the source of Swan River, Swan River (Lindbergh Lake) or Swan River (Cygnet Lake) within this reach were excluded:

**Table 3.** Water rights analyzed for legal availability:

Water Right No.	Flow Rate (CFS)	Volume (AF)	Water Right No.	Flow Rate (CFS)	Volume (AF)	Water Right No.	Flow Rate (CFS)	Volume (AF)
76K 376 00	0.02	1.5	76K 87115 00	0.02	1.6	76K 215858 00	0.04	5.5
76K 840 00	0.02	1.5	76K 87704 00	0.02	1.0	76K 30003325	0.02	0.7
76K 3026 00	0.04	1.5	76K 87753 00	0.02	1.6	76K 30005618	0.17	10.5
76K 5617 00	0.03	1.5	76K 88530 00	0.02	1.6	76K 30024711	0.03	1.5
76K 5765 00	0.03	1.5	76K 92178 00	0.02	1.0	76K 30029677	0.07	1.5
76K 5847 00	0.06	1.5	76K 94320 00	0.02	1.6	76K 30029678	0.07	1.5
76K 5849 00	0.04	1.5	76K 94968 00	0.02	1.6	76K 30042646	0.02	1.0
76K 6053 00	0.04	1.5	76K 98855 00	0.08	3.0	76K 30043145	0.07	1.5
76K 6223 00	0.03	1.5	76K 98858 00	0.05	1.5	76K 30043702	0.02	1.8
76K 6460 00	0.05	8.0	76K 98917 00	0.08	1.5	76K 30043703	0.02	1.0
76K 6797 00	0.03	1.5	76K 99150 00	0.04	2.0	76K 30045596	0.07	1.5
76K 21215 00	0.03	1.5	76K 99169 00	0.05	1.5	76K 30045597	0.03	1.5
76K 21216 00	0.03	1.5	76K 99647 00	0.01	2.3	76K 30046073	0.07	1.5
76K 22979 00	0.06	1.5	76K 100128 00	0.05	2.5	76K 30046196	0.03	1.0
76K 28553 00	0.03	1.5	76K 103846 00	0.05	1.5	76K 30049898	0.07	1.5
76K 28856 00	0.03	2.0	76K 105114 00	0.03	1.5	76K 30064355	0.07	2.3
76K 29127 00	0.03	1.5	76K 105583 00	0.05	2.5	76K 30067191	0.04	1.0
76K 29742 00	0.03	1.5	76K 106317 00	0.03	1.6	76K 30103481	0.07	2.3
76K 31056 00	0.04	1.5	76K 107360 00	0.06	2.0	76K 30103655	0.03	1.0
76K 32059 00	0.04	1.0	76K 107803 00	0.06	1.5	76K 6214 00	0.05	1.5
76K 33290 00	0.03	1.0	76K 115188 00	0.01	5.0	76K 6215 00	0.06	1.2
76K 36692 00	0.03	0.8	76K 130080 00	0.02	1.5	76K 15949 00	0.17	1.4
76K 37653 00	0.03	1.5	76K 131013 00	0.04	1.5	76K 35141 00	0.11	13.6
76K 38511 00	0.02	1.5	76K 131044 00	0.08	2.0	76K 104519 00	0.05	1.5
76K 38765 00	0.02	1.0	76K 131055 00	0.07	1.5	76K 107687 00	0.03	5.0
76K 40934 00	0.03	1.0	76K 131066 00	0.04	1.5	76K 118414 00	0.22	26.4



**Table 3.** continued:

Water Right No.	Flow Rate (CFS)	Volume (AF)
76K 47643 00	0.03	0.5
76K 49192 00	0.10	2.0
76K 49192 01	0.01	0.5
76K 51692 00	0.06	1.5
76K 75192 00	0.04	2.1
76K 83705 00	0.02	3.5

Water Right No.	Flow Rate (CFS)	Volume (AF)
76K 142972 00	0.15	1.5
76K 147375 00	0.03	3.0
76K 147485 00	0.06	1.5
76K 149255 00	0.06	1.5
76K 149341 00	0.01	1.5
76K 150399 00	0.08	2.5

Water Right No.	Flow Rate (CFS)	Volume (AF)
76K 118415 00	0.07	0.8
76K 147352 00	0.11	9.8
76K 147353 00	19.00	22.0
76K 30069051	0.01	1.9
76K 30133481	0.07	0.5
76K 30103655	0.03	0.0
76K 30118147	0.02	0.0
76K 30119252	0.03	0.8
76K 30134215	0.03	0.3
76K 30133835	0.04	0.0

22. To determine legal demands on a monthly basis, flow rates and volumes were assigned to each month based on the period of use for each purpose listed on each water right. The existing demands were then compared to the adjusted median of the mean monthly flow and volume to determine legal availability. The following tables list monthly physical availability compared to monthly existing legal demands:

**Table 4 & 5** Monthly Physical Availability Compared to Monthly Legal Demands

Legal Availability using Condon Gage # 12369200 per USGS SREF (CFS)			
<u>Month</u>	<u>Physical Availability (CFS)</u>	<u>Existing Legal Demands (CFS)</u>	<u>Legal Availability (CFS)</u>
January	47.90	3.23	44.38
February	46.84	3.23	43.32
March	78.62	3.27	75.06
April	213.25	3.52	190.39
May	424.65	4.04	401.16
June	496.49	4.04	472.71
July	215.22	4.04	191.27
August	81.81	4.04	57.86
September	56.21	4.04	32.43
October	61.60	4.00	56.92
November	64.69	3.74	60.66
December	50.46	3.31	46.86

Legal Availability using Condon Gage # 12369200 per USGS SREF (AF)			
<u>Month</u>	<u>Physical Availability (AF)</u>	<u>Existing Legal Demands (AF)</u>	<u>Legal Availability (AF)</u>
January	2754.70	9.6	2745.10
February	2430.10	9.6	2420.50
March	4640.79	9.7	4631.09
April	12488.22	19.2	12469.02
May	25873.12	25.2	25847.89
June	29312.92	31.0	29281.92
July	12998.94	31.7	12967.26
August	4797.82	31.7	4766.15
September	3120.66	31.0	3089.67
October	3554.15	23.2	3530.96
November	3637.65	12.6	3625.02
December	2907.42	9.9	2906.52

24. The Department's calculation of median of the mean monthly flow rate and volume of water compared to existing legal demands on the source of supply demonstrates that the

proposed appropriation of 35 GPM up to 2.25 AF is legally available in every month of the proposed appropriation.

25. The Swan River flows into Flathead Lake which is controlled by Seli's Ksanka Qlispe' Dam (formerly Kerr Dam). The Confederated Salish and Kootenai Tribes (CSKT) operate the dam. The two claimed water rights for the dam, 76L 94408 00 and 76L 94409 00, are for 14,540 cubic feet per second (CFS) up to 614,200 AF for power generation, and a volume of 614,000 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 CFS for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 1,831,306 AF ( $614,200 + 1,217,106 \text{ AF} = 1,831,306 \text{ AF}$ ). Flathead Lake is managed to keep full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, the direct flow hydropower water right and storage for hydropower water right, can be fulfilled over a period of 64 days.

26. Seli's Ksanka Qlispe' Dam operations are complex and must accommodate many management factors including, but not limited to, federal licensing (Flathead Lake levels required by the Federal Energy Regulatory Commission) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gage at Polson (No. 12372000), for the time period of 1939-2006 (USGS, 2009). Even though CSKT hydropower water rights at Seli's Ksanka Qlispe' Dam require 1,831,306 AF to meet the hydropower rights claimed in the adjudication, the records show that Seli's Ksanka Qlispe' Dam's reservoir, Flathead Lake, consistently obtains full pool status each year.

27. Pending an adjudication of CSKT hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water above Seli's Ksanka Qlispe' Dam can reasonably be considered legally available during the period in which the Applicant seeks to appropriate.

## CONCLUSIONS OF LAW

28. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

29. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

30. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

31. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF Nos. 20-27)

### **Adverse Effect**

#### **FINDINGS OF FACT**

32. Applicant proposes to divert water directly from Lindbergh Lake using an electric pump. The Department has determined that water is physically and legally available for the proposed appropriation. Applicant's plan to prevent adverse effect to water rights of a prior appropriator in times of severe water shortage is to discontinue use of water from the source, and purchase water or have it delivered until such a time that water is once again legally available.

33. The Department finds that water from Lindbergh Lake is both physically and legally available in amounts that exceed the requested appropriation of 35 GPM up to 2.25 AF, ensuring no adverse effects to senior appropriators diverting water from Lindbergh Lake or the Swan River downstream to the confluence with Glacier Creek.

#### **CONCLUSIONS OF LAW**

34. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

35. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries



expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(8).

36. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

37. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

38. It is the applicant’s burden to produce the required evidence. *E.g.*, Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

39. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Westmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

40. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF Nos. 32, 33)

### **Adequate Diversion**

### **FINDINGS OF FACT**

41. The diversion means consists of a 2 hp submerged electric pump located in Lindbergh Lake in front of Applicant’s property. The pump is connected to a 2-inch polyethylene pipe which brings water to the house. A pressure tank regulates pump operation; when pressure in the tank

falls below a set level, the pump will turn on and refill the tank. Water used at the house will be treated via a septic system and discharged into a drain field, Missoula County Septic Permit # SP22-0199 dated 7/13/2022. The system will be installed to supply water to a residential dwelling and irrigation of 0.50 acres of lawn and garden. Lawn and garden irrigation will be supplied by 5 frost-free outdoor faucet lines buried underground throughout the property with frost free faucets. A ¾ inch garden house will be attached to the frost-free faucets along with a 5/23-inch sprinkler. Watering will occur from April 25<sup>th</sup> to October 5<sup>th</sup> by running 2 faucets at a time for 30 minutes then rotating, three times per week.

### CONCLUSIONS OF LAW

42. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

43. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

44. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 41).

### Beneficial Use

### FINDINGS OF FACT

45. The proposed appropriation of 35 GPM up to 2.25 AF per year from Lindbergh Lake is for the purpose of domestic and lawn and garden. Water will be appropriated and used year-round for domestic use in one residence that has already been constructed, and from April 25 through October 5 for lawn and garden irrigation. The flow rate diverted will be limited by the size of the pump and pump head and the Department finds it is reasonable for the requested purposes.

46. Applicant's request to divert a flow rate and volume of 35 GPM up to 2.25 AF per year for domestic and lawn and garden use is based on Administrative Rules of Montana (ARM) 36.12.115(2)(a), allocating 1.0 AF per household for year-round domestic use and ARM 36.12.115(2)(b), allocating 2.5 AF per acre per year for lawn and garden on 0.5 acres (2.5 AF/acre  $\times$  0.5 acres = 1.25 AF).

### CONCLUSIONS OF LAW

47. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

48. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

49. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

50. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the*

*Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

51. Applicant proposes to use water for domestic and lawn and garden use which is a recognized beneficial use. Applicant has proven by a preponderance of the evidence domestic and lawn and garden are a beneficial uses and that 2.25 AF of diverted volume and 35 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 45-46).

### **Possessory Interest**

#### **FINDINGS OF FACT**

52. The applicant signed the application form affirming the applicant has possessory interest in the property where the water is to be put to beneficial use.

#### **CONCLUSIONS OF LAW**

53. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

54. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

55. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 52)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76K 30158059 should be GRANTED.

The Department determines the applicant may divert water from the Swan River (Lindbergh Lake), by means of a 2 hp pump, from January 1 to December 31 at 35 GPM up to 2.25 AF, from a point in the NENWSE of Section 23, T19N, R17W, Missoula County, for domestic use from January 1 to December 31 and lawn and garden use from April 25 to October 5, annually. The Applicant may irrigate lawn and garden area consisting of 0.5 acres. The place of use is in the NENWSE of Section 23, T19N, R17W, Lot 60A of Diamond L Bar Ranch Third Lakeshore Tract #3, Missoula County.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are



received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 16<sup>th</sup> day of June 2023.

/Original signed by Jim Nave/

Jim Nave, Manager

Missoula Regional Office

Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 16<sup>th</sup> day of June 2023, by first class United States mail.

BRANDON & JANNA PAGE  
8971 SACKETT DR.  
PARK CITY, UT 84098

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NAME

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DATE